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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

JAMES W. HELTON, II,

Petitioner,

versus

STATE OF INDIANA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

PETITION FOR CERTIORARI

WILLIAM VAN DER POL JR.
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27 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Indiana's Criminal Gang Activity Statue (Gang Statue) is unconstitutional because:

I. It is void for vagueness under the First and Fourteenth Amendments to the U.S. Constitution.

II. It is unconstitutionally overbroad and impermissibly infringed upon Helton's right of association guaranteed under the First and Fourteenth Amendments to The U.S. Constitution.

III. It deprived Helton of equal protection of the laws as guaranteed under the Fourteenth Amendment to the U.S. Constitution.

LIST OF PARTIES TO PROCEEDINGS

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CITATION TO OFFICIAL REPORT OF OPINIONS

Citation to Official Decision of the Indiana Court of Appeals:

624 N.E. 2d 499

Citation to Official Decision of the Indiana Supreme Court denying Petition for Transfer

See Appendix to Petition For Certiorari

JURISDICTIONAL GROUNDS FOR WRIT OF CERTIORARI

Date of entry of decision of Indiana Court of Appeals, First District

December 1, 1993

Date of entry of decision of the Indiana Supreme Court denying Transfer:

August 6, 1996

Date of Entry of Denial of Petition for Re-Hearing:

No Petition for Re-Hearing allowed Pursuant to Indiana appellate Rule 11(B) (8).

Statutory Provision granting authority to review:

28 U.S.C. § 1257

VERBATIM RECITATION OF PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

I.C. 35-45-9-3

(verbatim reproduction contained in Appendix)

I.C.35-45-9-1

(verbatim reproduction continued in Appendix)

United States Constitution, Amendment I

(verbatim reproduction contained in Appendix)

United States Constitution, Amendment XIV

(verbatim reproduction contained in Appendix)

STATEMENT OF THE CASE

On February 12, 1992, several youths participated in a meeting behind the Sycamore Trace Apartments in Mooresville, Indiana (Record p. 252). Travis Hammons was initiated into the group voluntarily (Record p. 254). An initiation rite was a requirement for membership in the group (Record p. 254).

Scott Bullington, a member of the group testified that Travis Hammons knew what the initiation rite was and consented to it (Record p.228).

Officer Randy Earles also testified that Travis Hammons knew what the initiation rite involved and agreed to participate (Record p. 258).

Officer Earles further testified that he had no information or allegations concerning any batteries committed by members of the group on individuals outside the group(Record p. 260).

On April 24, 1992, Information was filed charging the Defendant, James W. Helton, II, with Participation in a Criminal Gang. On April 27, 1992, the Morgan Circuit Court waived Juvenile Jurisdiction over the Defendant to the Morgan Superior Court.

On June 3, 1992, the Court issued an Entry and Order Amending the Information to Criminal Gang Activity.

On January 13, 1993, the Defendant appeared by counsel at a Hearing on Defendant's Motion in Limine and Defendant's

Objection to the State's Motion to Amend Information. The Court ordered that the previous Order granting the State's previous Motion to Amend be stricken and ruled on Defendant's Motion in Limine.

On January 14, 1993, a Court Trial was held. The Defendant appeared in person and by counsel. The Defendant was advised of and waived his right to a jury trial. The Defendant's guardian also waived Defendant's right to a jury trial. The Court took the matter under advisement.

The Court issued an Entry and Order Re: Finding of Guilt on January 21, 1993, which state as follows:

> This Court having held a Court Trial on January 14, 1993. The State having appeared in person and with counsel. The Defendant having been advised of his rights and having waived jury trial in this matter. The State having presented it's evidence herein;
>
> THE COURT NOW FINDS that the evidence presented by the State convinces the Court beyond a reasonable doubt that the Defendant is guilty of Criminal Gang Activity, I.C. 35-45-9-3.
>
> THE COURT NOW ORDERS that a presentence investigation report be conducted by the Probation Department within 5 days of this order for the purpose of furnishing

information necessary to conduct the presentence investigation.

The Defendant shall report to the Morgan County Probation Department within 5 days of this order for the purpose of furnishing information necessary to conduct the presentence investigation

On March 1, 1993, the Court held Sentencing. The Defendant appeared in person and with counsel. The Court sentenced the Defendant as follows:

The defendant be fined in the sum of $1.00, and in addition, the court costs in the amount of $113.00 be paid; that the fine and costs be paid pursuant to an order of probation filed.

The defendant be sentenced to imprisonment in the Indiana Department of Correction for a period of 3 years with a jail time credit for 8 days, and 16 days Class credit time; however, serving of said sentence was withheld with an order of probation for a term of 6 months to be served in the Morgan County Jail.

That the sentence be served consecutively to any other time.

The Court further ordered:

That any bail filed in this case be released.

That the Defendant is to report to the Morgan County Jail on June 7, 1993, at 8:00 a.m.

A Praecipe was filed with the Clerk of the Morgan Superior Court on March 5, 1993. The Record of the Proceedings was filed with the Clerk of the Indiana Court of Appeals on May 28, 1993. The Defendant is currently out on bond.

On December 1, 1993, the Indiana Court of Appeals, First District, affirmed Appellants conviction and upheld the constitutionality of the Indiana Gang Statute, by written opinion. On December 21, 1993, Appellant filed his Petition for Rehearing with the Indiana Court of Appeals. The Petition for Rehearing was denied of January 13, 1994.

On February 1, 1994, the Appellant filed his Petition for Transfer to the Indiana Supreme Court. The petition for Transfer denied on August 6, 1996.

ARGUMENT

I. THE CRIMINAL GANG ACTIVITY STATUTE IS VOID FOR VAGUENESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

The Indiana Criminal Gang Activity Statute is vague in violation of the First and Fourteenth Amendments to the U.S. Constitution, Article 1, §31 and Article 1, § 9 of the Indiana Constitution.

Void for vagueness analysis involves determining whether adequate notice of sanctions is given to potential offenders and whether the statute involves arbitrary and discriminatory enforcement. Sherelis v. Duckworth, 675 F.Supp. 1144 (N.D. Ind. 1987).

The statute in question fails both parts of the vagueness test. The language of the statute is ambiguous and leaves persons of average intelligence without a clue as to what conduct is prohibited. The statute reads as follows:

> A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony.

I.C. 35-45-9-3

The definition of "criminal gang" is not helpful in clarifying the conduct which is prohibited. The definition is as follows:

As used in this chapter, "criminal gang" means a group with at least five (5) members that specifically:

(1) either:

(A) promotes, sponsors, or assists in; or

(B) participates in ; and

(2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery (I.C. 35-42-2-1)

I.C. 35-45-9-1

The definition of a gang requires that it be a group of more than five individuals who commit battery, a felony, or an offense that would be a felony if committed by an adult. I.C. 35-45-9-1

In this case the Defendant was prosecuted under the statute for allegedly committing a battery on another member of his group, as part of an initiation ritual. (Record p. 254, 258). There was no commission of an independent felony or battery against someone other than a member of the group itself. (Record p. 260).

Appellee, in their brief, sets out the statutory elements of the crime as follows:

1. The Defendant;

2. Knowingly or intentionally;

3. Participated in;

4. The IGD, which had at lest five (5) members;

5. Which required the commission of a Battery;

6. For membership or continued membership.

Brief of Appellee p. 5.

Under the State's interpretation of the statute in question, the term "participated in" relates to "The IGD". Another logical interpretation of the statute is that the term "participated in" modifies, "the commission of a Battery".

It would appear from a close reading of the Court of Appeal's decision that they have taken the latter approach. The Court of Appeals, in its decision stated, "Furthermore, we construe the Gang Statute to require that the active member with guilty knowledge also have a specific intent or purpose to further the group's criminal conduct before he may be prosecuted". Helton v. State, 624 N.E.2d. 499 (Ind. App., 1993) at. 508 Further in footnote 13, the Court when on to state,"

The Supreme Court and Court of Appeals construed:

> "or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons [who teach, advocate, or encourage the violent overthrow of government], knowing the purpose thereof, is guilty of a felony .

> ..
> to mean that only active members, and not merely passive, inactive or purely technical members,, with knowledge of the groups's illegal advocacy and a specific intent to bring about the group's criminal advocacy could be prosecuted for acquisition or holding of membership in such a group.

Id. at 508-509.

Clearly this wording indicates that something greater than mere participation in the group is necessary for prosecution under this statute. Therefore, the term "participated in", under the Court of Appeal's analysis, modifies the commission of a criminal act. Otherwise, mere passive membership in a group which meets all of the other statutory qualifications would subject a Defendant to prosecution under this statute.

One need only look at the different interpretation put on this statute by the State, and by the Court of Appeals to see that this statute must be declared unconstitutionally vague. If the State and the Judges of the Indiana Court of Appeals cannot agree as to the proper interpretation of a statute, clearly the statue is not written in a form which affords persons of reasonable intelligence what is proscribed conduct.

In this case an act to someone outside the group should be required because as it stands, the definitional requirement of the

crime (a group who commits battery) and the prohibited act (battery) are the same act.

The statute fails the second prong of the vagueness test because it encourages arbitrary and discriminatory enforcement. Sherelis v. Duckworth, 675 F.Supp. 1144 (N.D. Ind. 1987). As Justice O' Conner stated in the case of Kolander v. Lawson, 461 U.S. 352 (1983),

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principle element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement"

Kolander at 357-358, citing Smith v. Gogeun, 415 U.S. 556, at 574, (1974). The Indiana Gang Statute provides no such legislative guidelines.

The statute seeks to prohibit certain groups of individuals from freely exercising their right of association as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, Article 1, § 9 and Article 1, §31 of the Indiana Constitution. The decision as to which groups may associate without fear of criminal repercussions and which may not, is vested in the prosecutors, who decide whom to prosecute under the statute.

Prosecutors have the power to choose when to prosecute. Worthington v. State

(1980), Ind. App., 409 N.E.2d 1261. However, this discretion is not boundless. The practical effect of the vagueness doctrine is not to make statutes readable by the laity but to limit the discretion of police and prosecutors- a purpose of the doctrine that is receiving increasing recognition. Waldron v. McAtee, 723 F.2d 1348, (7th Cir. 1983).

Under the Indiana Criminal Gang Activity Statute, prosecutors are vested with unfettered discretion in choosing to whom to apply the statute. Applying the vagueness doctrine to this law requires that it be voided, due to the lack of any checks on prosecutorial discretion. Prosecutors are not chosen to dictate to society which associations are permissible and which are not. The danger of unfettered prosecutorial discretion is elevated when constitutional rights are inhibited by the statute in question. Gov't Suppliers v. Bayh, 734 F.Supp. 853 (S.D. Ind. 1990).

A statute must be subjected to stricter scrutiny when determining the constitutionally permissible degree of vagueness, due to the inhibiting effect on a constitutionally protected right. Id at 868.

The statute prohibits the Defendant from meeting with the members of his group, since the prosecutor chose to bring charges against the Defendant for this particular association.

An additional problem with this statute is that once a group is labeled as a "criminal gang" under the statute, nothing in the statute prevents prosecutors from

charging the members with "Criminal Gang Activity" at any point in the future. In order to become a "criminal gang" a group of five or more individuals must: promote, sponsor, assist or participate in; and require as a condition of membership the commission of a felony, an offense that would be a felony if committed by an adult, or the offense of battery. I.C. 35-45-9-1.

Even if the members do not commit any criminal offenses beyond the one necessary to label them as a criminal gang, they may be prosecuted for "Criminal Gang Activity", which is " knowingly or intentionally actively" participating in a criminal gang. I.C. 3545-9-3

In this situation persons charged under Indiana's Criminal Gang Activity Statute can be prosecuted for maintaining their statuses as gang members, regardless of whether or not they commit any crimes. The U.S. Supreme Court ruled that one may not be prosecuted for a status in Robinson v. California, 370 U.S. 660 (1962) .

Additionally, the statute inhibits the Defendant's freedom of association as protected by the First Amendment to the U.S. Constitution. As discussed above, the Defendant could be prosecuted for being the member of a gang, even if the members of the "gang" remain honest, law-abiding citizens for the rest of their lives. The Defendant could be inhibited from exercising his right of association, for fear that he will be arrested for Criminal Gang Activity if seen with the members of what was once labeled as

a criminal gang for the purposes of the statute.

The Defendant's status as a "gang member" will continue despite the underlying felony or battery required for that status being outside the statute of limitations. The statute of limitations for Class D felonies (i.e. Criminal Gang Activity) is as follows:

> (a) Except as otherwise provided in this section a prosecution for an offense is barred unless it is commenced :
>
> (1) within five (5) years after the commission of a Class B. Class C, or Class D felony. . .

I.C. 35-41-4-2.

The Defendant will maintain his status as a gang member ad infinitum, and nothing in the statute prevents a prosecutor from charging him with Criminal Gang Activity at any point beyond the five year statute of limitations for Class D felonies.

The Court of Appeals, in its written decision, attempted to provide the "minimal legislative guidelines" to differentiate permissible batteries from illegal and therefore not constitutionally protected batteries. They accomplished this by carving a number of exceptions on to the case of Jaske v. State, (1989), Ind., 539 N.E.2d 14. Of particular interest is the second created exception,

(2) Where it is against public policy to permit the conduct or resulting harm even though it is consented to, . . .

Helton v. State, at 514.

This exception merely shifts the lack of constitutional safeguards concerning reasonable knowledge of proscribed activities and the lack of legislative guidelines from the Gang Statute as a whole, to the portion of the Statute defining battery. This exception would allows unfettered discretion for the State to prosecute consensual battery whenever it deemed that the battery was against "public policy".

While it may be argued that prosecutorial discretion provides an avenue of escape, the U.S. Supreme Court has made it clear that statutes must contain specific guidelines to prohibit the state from making a standardless sweep to pursue their own predilections. The legislature may not abdicate their duty to provide those standards. Smith v. Gogeun, 415 U. S. 556 (1974).

No reasonable legislative guidelines or standards are present in this statute. The Court of Appeals, by judicial fiat, has attempted to carve the necessary guidelines. However, ruling precedents make it clear that it is the duty of the legislative branch, and not the judicial branch to provide these standards.

This is particularly true when the judicially created guidelines still run afoul

of the exact same problems, by creating a guideline as likely to encourage discriminatory enforcement as "against public policy". Helton, at 514.

Therefore Defendant asserts that I.C. 35-45-9-3 is void for vagueness under both the U.S. and Indiana Constitutions.

II. THE CRIMINAL GANG ACTIVITY STATUTE IS UNCONSTITUTIONALLY OVERBROAD, AS IT INFRINGES UPON DEFENDANT'S FIRST AMENDMENT RIGHT OF ASSOCIATION.

The Indiana Criminal Gang Activity Statute is unconstitutional due to its overbreadth. The statute infringes upon the right of association, which is protected by the First Amendment to the U.S. Constitution.

The United States Supreme Court has recognized a distinction between the vagueness doctrine and the overbreadth doctrine. Zwickler v. Koota, 389 U.S. 241 (1967).

The right of association guaranteed by the First Amendment can foreseeably be infringed by the Criminal Gang Activity Statute. The terms are so broad that any number of permissible associations could potentially be prosecuted, in violation of their rights of association.

The Indiana Supreme Court has held:

> A penal statute is unconstitutionally overbroad if its sanctions are applicable to activities that are protected by the First Amendment;

> invalidity of such statute rests on fact that it constitutes a substantial deterrent to free exercise of important First Amendment rights.

Grody v. State, (1972), 257 Ind. 651, 278 N.E.2d 280.

The significance of the First Amendment rights was emphasized by the U.S. Supreme Court:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-433 (1962).

In this case, the Defendant's right of association, as guaranteed by the First Amendment, was infringed upon by prosecution under the Criminal Gang Activity Statute. The Defendant's conduct, in associating with a

group of juveniles, was protected by the First Amendment.

Even if the Defendant's particular acts were not protected by the First Amendment, he nevertheless has standing to challenge overbreadth grounds. The Defendant may challenge the statute if it may conceivably be applied unconstitutionally to others, depriving them of their First Amendment rights. 16A Am. Jur. 2d Constitutional Law § 461 (1979), Osborne v. Ohio, 110 S.Ct. 1691 (1990), Footnote 8, citing Massachusetts v. Oakes, 109 S.Ct. 2633 (1989)

Generally, constitutional rights are personal to an individual, and violation of a third party's constitutional rights cannot be claimed by Defendant. Kirkland v. State (1968), 249 Ind. 305, 232 N.E.2d 365, 366. However, the U.S. Supreme Court has recognized an exception to the standing requirement in the area of First Amendment rights. 16A Am. Jur. 2d Constitutional Law § 461 (1979). Due to the importance of the First Amendment freedoms to our society, the Court has held that, although a statute or ordinance may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its unconstitutional vagueness or overbreadth as applied to other persons not before the court. 16 A Am. Jur. 2d Constitutional Law § 461 (1979), citing Bigelow v. Va., 421 U.S. 809 (1974); see also, Osborne v. Ohio and Massachusetts v. Oakes, supra.

The statute is overbroad because it can be invoked to prosecute this Defendant for exercising his right of association. At any

point in the future the Defendant can be prohibited from associating with the members of his group, or risk prosecution for associating with members of a group that was once labeled as a criminal gang by the prosecutor.

Furthermore, Appellant may challenge the statute on overbreadth grounds even if his particular conduct was not constitutionally protected. Any person may challenge a statute that may conceivably interfere with the free exercise of some person's First Amendment rights. The U.S. Supreme Court has done away with the standing requirement in the area of First Amendment rights, due to the importance of these rights to our society.

An example of legally permissible conduct that could conceivably be inhibited by the statute is participation in high school football:

> A football team is a group of at least five members that specifically:
> (1) either:
> (A) promotes, sponsors, or assists in; or
> (B) participates in; and
> (2) requires as a condition of membership or continued membership; the offense of battery (i.e. sacking quarterbacks, tackling running backs and blocking)

I.C. 35-45-9-1.

The football players must perform these acts to make the team and to remain on the team. These acts clearly would constitute battery if not performed on the playing

field. This is legally permissible conduct that could potentially be inhibited by the Criminal Gang Activity Statute.

Numerous other "socially redeeming" activities would likewise be prohibited under this statute. For example, circumcision is a requirement of membership for males into the Jewish faith. The act of circumcision is clearly a touching in a "rude, insolent or angry manner". Within a significant segment of our society, this "battery" is not only socially valued, but an absolute necessity. However, this "battery", even though consensual, would still subject the Rabbi to prosecution from an Anti-Semitic prosecutor.

Equally true would be the possibility of the prosecution of the entire police community. While no one would seriously question the value that the police have to society, they are a group of five or more which requires hand-to-hand combat techniques at the Police Academy.

While the Court of Appeals may choose to label this statute as not overbroad because of a single impermissible application, these examples make it clear that a whole range of activities are potentially proscribed under this statute. Helton, at 514. The only way out of this dilemma is to relocate these constitutional concerns into the "battery" portion of the statute; a view which was espoused by the Court of Appeals in it's decision. However, as previously discussed, the Court of Appeal's exceptions carved into Jaske run afoul of the constitutional vagueness doctrine.

Appellant asserts that Indiana's Criminal Gang Activity Statute is unconstitutionally overbroad.

III. THE CRIMINAL GANG ACTIVITY STATUTE DEPRIVED THE DEFENDANT OF EQUAL PROTECTION UNDER THE LAWS AND EQUAL PRIVILEGES.

The Indiana Criminal Gang Activity Statute deprived the Defendant of Equal Protection of the laws, as guaranteed by the 14th Amendment to the U.S. Constitution.

The relationship between the state and federal clauses is as follows:

> When the equal protection clause of the Fourteenth Amendment of the United States Constitution [U.S.C.A. Const. Amend. 14] has been violated, it necessarily follows that the equal privileges provision of the

Indiana Constitution has also been violated.

Indiana High School Athletic Ass'n v. Raike (1975), 164 Ind. App. 169, 329 N.E.2d 66, quoting Const. Art., § 23.

The equal protection clause does not prevent a state from indulging in reasonable legislative classification. Decatur County Rural Elec. Membership Corp. v. Public Service Co. (1973), 261 Ind. 128, 301 N.E.2d 191, 197.

However, a law that is not facially discriminatory may have equal protection problems if it is discriminatorily enforced

or applied. Center Township v. Coe,(1991), Ind. App., 572 N.E.2d 1350.

In the case at bar, the statute has been and will continue to be applied in a discriminatory manner.

The statute is equally applicable to a variety of group including football teams, boxing clubs, fraternities and gangs. However, a prosecutor is able to pick and choose among these groups and prosecute the associations she or he considers undesirable. The groups chosen tend to be comprised of poorer, disadvantaged youths such as groups that refer to themselves as, or are labeled as, gangs.

Under the trial court's interpretation of the statute, the prosecutor may prosecute a "gang" for Criminal Gang Activity (a Class D felony), but prosecute a fraternity under the Hazing Statute (I.C. 35-42-2-2) for the same conduct.

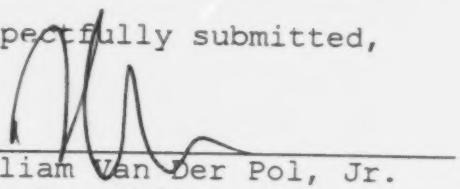
This type of discriminatory application of the law amounts to a denial of equal protection of the laws to those individuals in the groups considered undesirable and prosecuted under the Criminal Gang Activity Statute for intragroup violence.

In addition, the judicially created classification of a battery "against public policy . . . even though it is consented to" would allow discriminatory enforcement against those groups deemed not worthy of protection. As such, this enforcement would also violate Federal and State Equal Protection Guarantees.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests this Court to grant Certiorari to decide the important Federal Questions presented, and to clarify conflicting decisions of the lower courts.

Respectfully submitted,



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(2)

Supreme Court, U.S.
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IN THE COURT OF APPEALS

55A01-9305-CR-178

James W. Helton, II, Appellant
v.
State of Indiana, Appellee

December 1, 1993
Rehearing Denied August 6, 1996

Baker, J.

Today we decide whether Indiana's Criminal Gang Activity Statute is constitutional under the United States and Indiana Constitutions.

Appellant-defendant James W. Helton, II, appeals his conviction for Participating in Criminal Gang Activity, a Class D felony.[1]

ISSUES

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[1] IND. CODE 35 - 45 - 9 - 3 (1993).

Helton raises several issues for our review:

I. Whether Indiana's Criminal Gang Activity Statute (Gang Statute) is unconstitutional because:

A. It is void for vagueness under the First and Fourteenth Amendments to the U.S. Constitution and article 1, S 9 and S 31 of the Indiana Constitution.

B. It is unconstitutionally overbroad and impermissible infringed upon Helton's right of association guaranteed under the First and Fourteenth Amendments to the U.S. Constitution and article 1, S 9 and S 31 of the Indiana Constitution.

C. It deprived Helton of equal protection of the laws as guaranteed under the Fourteenth Amendment to the U.S. Constitution, and article 1, § 23 of the Indiana Constitution.

II. Whether the trial court erred in allowing a police officer to testify as to the history of the Imperial Gangster Disciples under the pedigree exception to the rule against hearsay.

III. Whether the Gang Statute applies to Helton's conduct.

FACTS

The undisputed facts[2] are that James Helton, a s sixteen-year-old white male also known as G-Dog, is a member of the Imperial Gangster Disciples (IGD), a twelve member youth group.[3] In October 1991, while Helton was second in command or the number two G. he and other members initiated Scott Bullington into IGD. IGD members perform the initiation ritual, called "a 46," by striking the initiate forty times in the head and six times in the chest while standing in a circle around an ironing board with a blue bandanna, a candle, and a handgun placed on top.

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[2] At the November 9, 1993 oral argument held in Bloomington, Indiana, the portion agreed that the facts were not in dispute.

[3] IGD member Biff Rinnick testified that IGD stands for Insane Gangster Disciples. Record at 233. This may be a more appropriate names however, all other IGD members who testified stated that IGD stands for Imperial Gangster Disciples. The IGD gang colors are black and blue.

In February 1992, twelve to fourteen IGD members met to initiate Travis Hammons. Helton and two other IGD members initiated Hammons after number one G Charlie Moran recited the traditional initiation "prayer."[4]. While four IGD members restrained Hammons, Helton delivered 20 bare-fisted, hard blows directly to Hammons' head while pronouncing "he was going to beat [Hammons'] ass into the ground."[5] Record at 218. Both Bullington and Hammons knew of the initiation rite and consented to "a 46" by Helton and other members in order to become IGD members themselves.

At Hammons' initiation, IGD members also discussed the need to travel in pairs, to be aggressive with others, to never back away from anyone or a fight, determined that anyone who missed an IGD meeting would "get violated" (receive six blows to the chest), and

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[4] "At initiations, IGD members circle around an ironing board while a leader recites the IGD "prayer." Record at 221-22, 236. The "prayer" ins "Let it rain, let it pour, let a G [IGD member] kill a Lord [Vice-Lord, another gang]." Record at 222.

[5] Helton and another member held the gun briefly during the initiation, however, it remained on the ironing board moat of the time.

decided that anyone leaving IGD would be "eight-balled" (surrounded by eight members and then beaten by them).

On April 23, 1992, the Morgan County court waived juvenile Jurisdiction over then fifteen-year-old Helton, to the Morgan Superior Court. On April 24, 1992, the State charged Helton by information with participating in a criminal gang. The State later amended the information to charge Helton with participating in criminal gang activity on or about February 12, 1992, for committing a battery on Hammons. Helton was released on bond. While on release, Helton threatened a witness for the State and was suspended from high school for fighting with two persons. The court then placed special conditions on Helton's bond, including the condition that Helton not contact any of the fourteen persons concerned directly or indirectly until the matter was concluded.

Helton waived his right to a Jury trial, and on January 21, 1993, the trial court determined the Gang Statute was constitutional and found Helton guilty of criminal gang activity. The trial court sentenced Helton to three years imprisonment, suspended so long

as he complied with the terms of his probation. Helton now appeals.

DECISION AND DISCUSSION

I. Constitutionality

In considering constitutional challenges, we accord the statute with every reasonable presumption supporting its validity and place the burden upon the party challenging it to show unconstitutionality. Brady v. State (1991), Ind., 575 N.E.2d 981, 984. To be constitutional, a statute must be carefully drafted or be authoritatively construed to punish only constitutionally unprotected conduct. Waldron v. McAtee, 723 F.2d 1348, 1354 (7th Cir. 1983). We will assign a constitutional meaning to a statute if we can do so while remaining faithful to the legislative purpose. Price v. State, No. 49S02-9311-CR-1197 (Ind. filed Nov. 1, 1993). The language of a Judicial opinion is as good as the language of the statute construed in the opinion. Waldron, at 1354.

A. Vagueness

Helton first contends the Gang Statute is void under the First[6] and Fourteenth[7] Amendments to the U.S. Constitution and article 1, § 9 of the Indiana Constitution[8] because it is unconstitutionally vague. We will address Helton' contentions under each

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[6] "The First Amendment to the U.S. Constitution states: "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble...."

[7] § 1 of the Fourteenth Amendment to the U.S. Constitution states:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[8] Article 1, S 9 of the Indiana Constitution states: No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever s but for the abuse of that right, every parson shall be responsible.

constitution together since state and federal vagueness analysis is the same.

As a preliminary matter, we note that the First Amendment's command that Congress shall make no law abridging the freedom of speech or the right of the people to peaceably assemble has been incorporated into the Fourteenth Amendment and as such applies to all States. Near v. Minnesota, 283 U.S. 697 (1931). Secondly, the right to peaceably assemble is found in article 1, § 31 of the Indiana Constitution.[9]

Under basic principles of due process, a law is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).[10] A statute is

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[9] Article 1, S 31 of the Indiana Constitution states No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.

[10] "Vague laws offend three important values (1) the requirement that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, (2) by not providing explicit standards for those who apply them, vague laws lead to arbitrary and discriminatory enforcement and impermissible delegate basic policy matters to police, judges and juries for resolution on an ad hoc basis, and (3) where a

not void for vagueness if individuals of ordinary intelligence would comprehend it to fairly inform them of the generally proscribed conduct. Broadrick v. Oklahoma, 413 U.S. 601 (1973); State v. Downey (1985), Ind., 476 N.E.2d 121, 122; Mallory v. State (1990), Ind. App., 563 N.E.2d 640, 644-45, trans. denied. Statutes which threaten to inhibit the exercise of constitutional rights or which impose criminal penalties are subjected to greater scrutiny and less vagueness is tolerated in them than in other types of laws. Government Suppliers Consolidating Services v. Bayh, 734 F. Supp. 853, 868 (S.D. Ind. 1990). However, the act of associating with compatriots in crime is not a protected associational right. United States v. Choate, 576 F.2d 165, 181 (9th Cir. 1978), cert. denied, 439 U.S. 953 (1978); Indiana Bell Telephone Co. v. Indiana (1980), Ind., 402 N.E.2d 962, 965.

Specifically, Helton claims the statutory language is ambiguous and

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vague statute impinges upon sensitive arena of basic First Amendment freedoms, it inhibits the exercise of those freedoms. Grayned, at 108-09.

leaves persons of average intelligence without any indication as to what conduct is prohibited. Helton does not articulate what is unclear, vague, or ambiguous in the Gang Statute, and we find no such shortcomings.

The Gang Statute provides: "A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony." A "criminal gang" is defined in I.C. 35-45-9-1 as:

> ... a group with at least five (5) members that specifically:
> (1) either:
> (A) promotes, Sponsors, or assists in; or
> (B) (B) participates in; and
>
> (2) requires as a condition of membership or continued membership;
>
> the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery (IC 35-42-2-1).

When reviewing a statute, we examine it in its entirety, interpreting words based upon their ordinary and plain meaning and not overemphasizing particular words.

Spaulding v. International Bakers Services, Inc. (1990), Ind., 550 N.E.2d 307, 309. When interpreting statutes, we reconcile them with each other whenever possible. Matter of Public Law No. 154-1990 (1990), Ind., 561 N.E.2d 791, 792; Benham v. State, No. 78A01-9303-CR-90, (Ind. App. filed Oct. 27, 1993).

The Gang Statute clearly forbids a person from knowingly and actively participating in a group with five or more members which participates in and requires as a condition of membership the commission of a battery. When Helton beat Hammons, he actively participated in the IGD gang with knowledge that the IGD gang participates in and requires as a condition of membership the commission of a battery. Helton's conduct is clearly proscribed by the Gang Statute.

Helton also argues the Gang Statute is vague because it did not warn him that his conduct of striking a consenting victim constituted a battery under the Gang Statute. We disagree.

A battery is committed when "[a] person ... knowingly or intentionally touches another person in a rude, insolent, or angry manner..." IND. CODE 35-42-2-1(a). Lack of consent is not a

statutory element of the offense of battery in Indiana. Moreover, our supreme court has expressly held that the victim's consent is not a defense to the charge of battery in certain circumstances. Jaske v. State (1989), Ind., 539 N.E.2d 14, 17-18. Therefore, Helton had fair warning that the Gang Statute prohibited gang members from committing batteries on any person, whether they are consenting or nonconsenting participants.

Additionally, Helton claims the Gang Statute is void for vagueness because it vests unfettered discretion in the prosecutor allowing him to enforce it in an arbitrary and discriminatory manner to punish groups he alone deems undesirable.

A statute is also void for vagueness if its terms invite arbitrary or discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 356-58 (1983); Price, No. 49S02-9311-CR-1197, slip op. at 29 (Ind. Nov. 1, 1993). However, no statute need avoid all vagueness. Grayned, at 110. Because statutes are condemned to the use of words, there will always be uncertainties for we cannot expect mathematical certainty from our language. Id.

Obviously, the decision to prosecute for any type of criminal

activity must reside somewhere. Miller v. State, No. 64S00-9012-DP-817 (Ind. filed Oct. 26, 1993). The prosecutor's decision to prosecute does not determine the final outcome. Id. at 18. Moreover, courts have repeatedly held this type of procedure constitutional. Id.; see also Coleman v. State (1990), Ind., 558 N.E.2d 1059, 1069, cert. denied, 111 S. Ct. 2912 (1991); Bieghler v. State (1985), Ind., 481 N.E.2d 78, 94, cert. denied, 475 U.S. 1031 (1986). Enforcement of laws always requires some degree of Judgment on behalf of police and prosecutors, but, as confined, that degree of judgment is permissible here. See Grayned, at 114 (ordinance forbidding deliberately noisy or diversionary activity that disrupts or is about to disrupt school not vague).

Furthermore, undesirable groups, the wrong type of crowd, or annoying conduct alone is not punishable under the Gang Statute. The Gang Statute does not permit five or more persons to associate only at the whim of a police officer or the prosecutor. See id. Rather the group must be one which both promotes, sponsors, assists in, or participates, and requires as a condition of membership the commission

of a felony or battery and the person must actively participate in the group, with knowledge of the group's criminal conduct and a specific purpose to facilitate the group's criminal conduct before the prosecutor may charge the person with participating in criminal gang activity.

The Gang Statute gives persons of ordinary intelligence fair warning of the proscribed, unprotected conduct and is thus not unconstitutionally vague.

B. Overbreadth

Helton also contends that the Gang Statute may conceivably interfere with the free exercise of others' First Amendment rights and legally permissible conduct such as contact sports.

1. Indiana's Constitution

Our supreme court recently held that there is no overbreadth analysis in Indiana's constitution and that federal overbreadth analysis does not apply in Indiana constitutional jurisprudence. Price, No. 49S02-9311-CR-1197, slip op. at 5 (Ind. Nov. 1, 1993). Unless the statute in issue is incapable of constitutional application, the court should limit itself to vindicating the rights of the

party before it.[11] Id. at 6. Thus, once an Indiana constitutional challenge is properly raised, the court should first determine whether the statute is capable of constitutional application and then determine whether its application in the case was constitutional, refraining from speculating about hypothetical applications. Id.

Since Indiana's Gang Statute is not incapable of constitutional application (See Issue I.A.), we pass over Helton's contention that the Gang Statute is overbroad under the Indiana constitution and turn instead to whether its application in this case was constitutional.

Helton was charged with criminal gang activity for committing a battery on Hammons and intentionally and actively participating in the IGD gang which promotes and requires as a condition of membership the commission

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[11] This is a self-imposed restriction similar to that imposed in article III of the U.S. Constitution. Price, No. 49S02-9311-CR-1197, slip op. at 7 (Ind. Nov. 1, 1993). The restriction preserves the function of the state judiciary and the special aptitude of courts to decide concrete controversies between interested parties. Id.

of a battery. The IGD gang requires its members to routinely assist in the commission of batteries upon persons who cause trouble for the gang, miss a meeting, join, or leave the gang. Indiana and federal constitutional protections of free speech and free association do not provide protection for associations made in furtherance of [crimes] or criminal conspiracy. Indiana Bell, at 965. Moreover, the act of associating with compatriots in crime is not a protected associational right. Choate, at 181; Indiana Bell, at 965. Application of the Gang Statute to Helton's conduct was constitutional under Indiana law.

2. Federal Constitution Analysis

The failure of Helton's vagueness challenge does not invalidate his overbreadth challenge under the U.S. Constitution. Gooding v. Wilson, 405 U.S. 518, 520 (1972); Van Zant v. State (1988), Ind. App., 523 N.E.2d 229, 233. A statute must be carefully drawn or authoritatively construed to punish only unprotected conduct and not be susceptible of application to protected expression. Gooding, at 522. A clear and precise penal statute may nevertheless be unconstitutionally

overbroad if its sanctions substantially prohibit activities protected by the First Amendment. Grayned, at 114; Grody v. State (1972), 257 Ind. 651, 655, 278 N.E.2d 280, 281-82.

The authoritative construction of statutes by state courts controls overbreadth analysis. Osborne v. Ohio, 495 U.S. 103, 113-14 (1990); Price, at 28. Therefore, the crucial question here is whether we determine that the Gang Statute sweeps within its prohibitions a substantial amount of conduct which may not be punished under the First and Fourteenth Amendments. See Grayned, at 115. We think not.

Here, Helton contends that the Gang Statute infringes upon his right of association guaranteed under the First and Fourteenth Amendments of the U.S. Constitution and article 1, § 9 and § 31 of the Indiana Constitution. As the basis for this challenge, Helton asserts that he was, and can be at any time in the future, prosecuted for merely associating with a group of juveniles that has been labelled a criminal gang.

First, the Gang Statute does not prohibit the mere association of five

or more persons as Helton contends.[12] Before a person may be charged with criminal gang activity, the Gang Statute expressly requires that the person actively participate in a group which promotes, sponsors, assists in, or participates in, and requires its members to commit felonies or batteries, with knowledge of the group's criminal advocacy. Furthermore, we construe the Gang Statute to require that the active member with guilty knowledge also have a specific intent or purpose to further the group's criminal conduct before he may be

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[12] We also note that once a "criminal gang" under the Gang Statute, not always a criminal gang. If a criminal gang one day decides it will no longer promote, sponsor, assist in, or participate in, or require the commission of a felony or a battery for membership or continued membership, then the group will no longer fall within the statutory definition of a criminal gang.

Therefore, members of a former "criminal gang" who adopt morals and policies of engaging in solely lawful conduct may associate freely without fear of prosecution under the Gang Statute. As discussed above, the Gang Statute does not unconstitutionally criminalize the mere status of gang membership. See Robinson v. California, 370 U.S. 660, 665-68 (1962) (one may not be prosecuted for status alone).

prosecuted.[13] Thus, the Gang Statute does not impermissibly establish

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[13] Reading the requirement of specific intent into the Gang Statute is a permissible construction which does not require us to improperly substantially rewrite the Statute.

In Scales v. United States, 367 U.S. 203 (1961), the U.S. Supreme Court held that U.S. Court of Appeals correctly and properly construed the membership clause of the Smith Act, which makes a felony the acquisition or holding of membership in an organization which advocates the overthrow of the U.S. Government, to cure any constitutional infirmities. The U.S. Supreme Court and Court of Appeals construed: "or becomes or is a member of, or affiliates with, any such satiety, group, or assembly of persons [who teach, advocate, or encourage the violent overthrow of government], knowing the purposes thereof-" is guilty of a felony ... to mean that only active members, and not merely passive, nominal, inactive or purely technical members, with knowledge of the group 's illegal advocacy and a specific intent to bring about the group 's criminal advocacy could be prosecuted for the acquisition or holding of membership in such an organization. The Scales Court read the elements of active membership and specific intent into the membership clause of the Smith Act based solely on that clause's requirement that a defendant have knowledge of the organization's illegal activity. United States v. Robel, 389 U.S. 258, 260 (1967) (citing Aptheker v. Secretary of State, 378 U.S. 500 (1964)).

In Robel, the U.S. Supreme Court held that section 5(a)(1)(D) of the Subversive Activities Control Act, which made it unlawful for any member of the Communist-action group to engage in any employment in any defense facility, could

guilt by association alone, but it requires that ~ defendant'. association pose the threat feared by the legislature in proscribing it, that is, the threat of criminal gang activity which terrorizes peaceful citizens. See Robel, at 264.

Second, the commission of a felony or a battery is not protected activity even when committed by a group exercising their constitutional right to free association. Choate, at 181.

Helton also contends that the Gang Statute is unconstitutionally overbroad because it could conceivably interfere with the free exercise of others' First Amendment rights and legally

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not be saved from constitutional infirmity because the requirements of active membership, guilty knowledge, and specific intent of furthering the group's unlawful goals could not be read into the statute's overly broad language without substantial rewriting. Robel, at 260-68. The statute in Robel established guilt by association, indiscriminately trapping membership which can be constitutionally punished (active membership, with guilty knowledge and specific intent) and membership that cannot be so proscribed (passive membership absent specific intent, even with knowledge of group 's unlawful aims). Robel, at 264-68. Our reading of specific intent into Indiana's Gang Statute, which itself expressly requires both active participation and intentional or knowing participation, is a permissible construction under Scales and Robel.

permissible conduct such as contact sports.

We first note that Helton's claim that the Gang Statute punishes protected activities of others is a valid federal overbreadth challenge. Because overbroad laws, like vague laws, deter privileged activity, an appellant has standing to raise a facial overbreadth challenge, even though he does not claim that the statute punished protected activity as applied to him. Grayned, at 114; Gooding, at 521. The overbreadth doctrine is an exception both to the traditional as applied mode of judicial review and to the general rule that an individual lacks standing to litigate the rights of third persons. United States v. Raines, 362 U.S. 17 (1960). However, a statute is not overbroad merely because one may conceive of a single impermissible application, but only if it prohibits a substantial amount of protected conduct. Osborne, at 112 (1990). There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment rights of parties not before the court for it to be facially challenged on overbreadth grounds. Los Angeles City Council v.

Taxpayers for Vincent, 466 U.S. 789 (1984).

Moreover, any thought that the Constitution prohibits criminal prosecution for all individual associational relationships unless accompanied by the commission of specific criminal acts, is dispelled by familiar legal concepts of conspiracy and complicity.'[14]' See Scales, at 225 (Governments may punish dangerous behavior and those who work to bring about such behavior). Since the legislature did not resort to either of these concepts, the critical inquiry here is whether the relationship between the fact of membership and the underlying substantive illegal activity is not too tenuous to permit its use as

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[14] 'There is no great difference between a charge of being a member of a group which engages in criminal activity and being a member of a conspiracy, many of whose participants are unknown or not before the court. Scales, at 226, n.18. Any imagined difficulties in attributing criminal conduct to an abstract entity are cured, as far as any individual defendant is concerned, by the requirements that the defendant knew that the organization engages in criminal advocacy, and that it was the defendant 's purpose to further the organization's criminal advocacy. Id. at 226-27.

the basis of criminal liability. Id., at 226. A statute which makes a felony the acquisition or holding of membership in an organization which advocates criminal behavior may constitutionally do so if it is narrowly drawn or authoritatively construed to punish only active members with a knowledge of the organization's illegal advocacy, and a specific intent to bring about or further the organization's criminal goals. Id., at 228; see also Robel, at 262-67.

Reading I.C. 35-45-9-1 and I.C. 35-45-9-3 together, the legislative purpose and a plain reading of the statutes dictate that the Gang Statute clearly forbids a person from:
(a) actively participating or being an "active" member![15] in a group with five

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[15] "The distinction between 'active' and 'nominal' membership is well understood in common parlance (citations omitted) and the point at which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case." Scales, at 223.

A person who merely becomes a member of an illegal organization, by this act alone, does nothing more than signify his assent to the group's purposes and conduct and provide moral encouragement and sympathy. Id. at 227. It may be argued that such encouragement and assent

or more members which promotes, sponsors, assists in, or participates in the commission of a felony or an act that would be a felony if committed by an adult or a battery, and requires as a condition of membership the same criminal conduct, (b) with knowledge of the gang's illegal advocacy of felonies or batteries,[16] and (c) with specific

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fall short of the active participation required to permit the imposition of criminal sanctions. Id. A member, as distinguished from an active participant or a conspirator, may indicate his approval of a criminal gang by the fact of his membership without thereby necessarily committing himself to further the criminal gang 's goals by any act or course of conduct whatever. Id. at 228.

The Gang Statute requires that a person knowingly and "actively participates" in the criminal gang and have a specific intent to further the gang 's unlawful goals before he may be prosecuted. "Actively participates" requires more than the mere voluntary listing of a person's name on the gang 's roll. The mere presence of a person's name on a gang 's roll is insufficient to impute to him the gang's illegal goals. Thus, the Gang Statute does not unconstitutionally establish guilt by association alone or unconstitutionally punish nominal, inactive, purely technical, or passive membership, even if accompanied by knowledge and intent. See id., at 222; see also Robel, at 262-66.

[16] The requirements of active participation and knowledge stand apart. The element of knowledge requires linking a defendant with the gang 's

intent to further, facilitate, or accomplish the substantive criminal conduct, that is, the commission of a felony or an act that would be a felony if committed by an adult or a battery.

Under the Gang Statute, as under the membership clause of the Smith Act in Scales, IGD is an organization which engages in the targeted criminal conduct. Neither a person who actively and knowingly works in the ranks of the criminal gang, intending to contribute to the success of the gang's. illegal activities, nor a member to whom the gang has assigned the task of carrying out the substantive criminal act, is immune from prosecution. See Scales, at 227.

To the extent that the Gang Statute prohibits individual activity which emanates from the association of five or more persons, the Gang Statute may constitutionally do so where:
The individual (1) is an active member of a group with five or more members which, promotes, sponsors, assists in, or participates in the commission of a felony or an act that would be a felony

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illegal activities, whereas, the element of activity may be shown by the defendant's participation in the general affairs of the gang. See Scales, at 223, n.15.

if committed by an adult or a battery, whether consensual or non-consensual, and which requires the same as a condition of membership or continued membership, (2) has knowledge of the group's criminal advocacy, and (3) has a specific intent to further the group's criminal goals.

When construed and applied so as to reach only active members who have knowledge of the gang's criminal advocacy and a specific intent to further the gang's criminal conduct, and therefore to prevent a conviction for mere passive membership, the Gang Statute does not infringe upon freedom of association in violation of the First Amendment. Thus, the member for whom the criminal gang is an instrument for the advancement of legitimate goals and policies does not fall within the Gang Statute's ban since he lacks the requisite specific intent to further criminal conduct. Such a member may be foolish, deluded, or perhaps merely unbelievably optimistic; however, he is not made a criminal by the Gang Statute. See id., at 230.

The Gang Statute does not cut deeper into the freedom of association than is necessary to deal with the substantive evil of gang violence and does not make criminal all association

with an organization which has been shown to engage in illegal activity. See id., at 229. The Gang Statute requires clear proof that a defendant actively participated in the gang with knowledge of its criminal advocacy and a specific intent to accomplish the gang's illegal aims. Thus the Gang Statute is not unconstitutionally vague or overbroad and does not unconstitutionally interfere with one's right to freedom of association.

C. Equal Protection Clause

Helton next contends that the Gang Statute deprived him of equal protection under the laws as guaranteed under § 1 of the Fourteenth Amendment to the U.S. Constitution and article 1, § 23 of the Indiana Constitution.[17] Specifically, Helton claims that the prosecutor has and will continue to apply the Gang Statute in a discriminatory manner to groups he alone deems undesirable, which tend to be poor, disadvantaged youths. Helton argues discriminatory prosecution for

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[17] Article 1, § 23 of the Indiana Constitution states: The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

intra-group violence denies individual members of undesirable groups equal protection of the laws.

When there is a violation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution, there is also a violation of the equal privileges clause of the Indiana Constitution. Indiana High School Athletic Ass'n v. Raike (1975), 164 Ind. App. 169, 176, 329 N.E.2d 66, 71 n.2. Therefore, we will address Helton's equal protection claims together.

The purpose of the equal protection clauses is to prevent the distribution of extraordinary benefits or burdens to any group. O'Brien v. State (1981), Ind. App., 422 N.E.2d 1266, 1270. A statute which does not discriminate on its face may nonetheless deny equal protection if it is enforced or applied in a discriminatory manner. Center Township of Marion County v. Coe (1991), Ind. App., 572 N.E.2d 1350, 1361. The defendant bears the burden of establishing such discrimination. Kashani v. Purdue Universitv, 763 F. Supp. 995 (N.D. Ind. 1991).

Here, Helton does not contend that the Gang Statute facially violates his right to association, rather he baldly

asserts, without any supporting evidence, that the prosecutor has applied and will continue to apply the Gang Statute in a discriminatory manner. "A defendant's constitutional right to equal protection of the laws is not violated by the prosecutor exercising discretion in deciding to prosecute or not to prosecute a violation of a criminal statute." Worthington v. State (1980), Ind. App., 409 N.E.2d 1261, 1267. Moreover, we held in Issue I.A. that the degree of discretion afforded the prosecutor under the Gang Statute is constitutional. Helton was not denied equal protection under the laws.

Additionally, Helton claim. he was denied equal protection of the laws inasmuch as the prosecutor has discretion to prosecute gangs for criminal gang activity, a Class D felony, but to prosecute fraternities under Indiana's Hazing Statute,[18] a Class B misdemeanor for the same conduct.

A statute which prescribes different punishments or different degrees of punishment for the same conduct committed under the same

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[18] IND. CODE 35-42-2-2 (1993)

circumstances by persons similarity situated violates the equal protection clause. Id., at 1267. Therefore, the critical inquiry here is whether the elements of the Gang Statute and the Hazing Statute are the same or essentially similar; if not, then no equal protection issue is presented. Id.

The Hazing Statute provides:

(a) As used in this section, "hazing" means forcing or requiring another person:

(1) with or without the consent of the other person; and

(2) as a condition of association with a group or organization;

to perform an act that creates a substantial risk of bodily injury.

(b) A person who recklessly, knowingly, or intentionally performs:

(1) an act that creates a substantial risk of bodily injury to another person; or

(2) hazing;

commits criminal recklessness, a Clans B misdemeanor.

(c) A person who recklessly, knowingly, or intentionally:

(1) inflict. serious bodily injury on another person; or

(2) performs hazing that results in serious bodily injury to a person;

commits criminal recklessness, a Class D felony.

I.C. 35-42-2-2. Hazing is a class B misdemeanor if the act involved creates only a risk of substantial bodily injury to another person. A person commits criminal recklessness, a class D felony, if the hazing act actually results in serious bodily injury to a person. A person may be prosecuted under the Gang Statute for a class D felony if, among other requirements, he is a member of a group which consists of five or more persons which requires the commission of a felony or an act that would be a felony if committed by an adult or a battery as a condition for membership or continued membership.

The elements of a class B misdemeanor under the Hazing Statute and a class D felony under the Gang Statute differ since the former applies to acts creating only a risk of bodily injury. Therefore, ~~there~~ are distinctions between the two offenses, and no equal protection question is presented. The statutes do not prescribe different punishment for the same conduct depending on the actor. Under each statute, an actor commits a class D felony if he engages in the same type of conduct.

In addition, gangs, fraternities, and all groups are treated similarly under both statutes. The prosecutor has discretion to charge gangs and fraternities alike under either statute if their conduct falls within the proscribed conduct. The fact that the prosecutor's discretion to prosecute or not to prosecute a criminal violation extends to two crimes instead of one does not convert this discretion into an unconstitutional delegation of legislative authority or constitute an equal protection violation even though the facts to be proven are very similar. Worthington, at 1267; People v. McCollum, 57 Ill.2d 440, 313 N.E.2d 462, 465 (Ill. 1974) (if conduct for which a defendant is prosecuted constitutes a misdemeanor under one statute and a felony under another there is no equal protection violation in convicting him of the felony).

The Gang Statute did not deprive Helton of equal protection of the laws or equal privileges or immunities.

II. Admissibility of IGD's History Under the Pedioree Exception

Next, Helton correctly contends and the State concedes that the trial court erred in allowing Officer Earles to testify concerning IGD's history under the pedigree exception to the

hearsay rule. See In re Paternitv of Tompkins (1989), Ind. App., 542 N.E.2d 1009, 1012 (the pedigree exception permits admission of a declarant's out of court declarations regarding parentage or ancestry. For the statement to be admissible under the pedigree exception, the declarant must be deceased and the declarant must have been related by blood or by marriage to the family of the person in question (emphasis in original)).

In criminal bench trials, we presume that the court disregarded inadmissible testimony and rendered its decision solely on the basis of relevant and probative evidence. Coleman, at 1062. Moreover, an erroneous admission of evidence will result in a reversal only if the defendant establishes prejudice to his substantial legal rights. Alva v. State (1993), Ind., 605 N.E.2d 169, 171.

In the present case, Helton received a bench trial. Therefore, whether Officer Earles' testimony about IGD's history was properly admissible or not is of no consequence. Helton has not established any error or prejudice. See Shockly v. State (1929), 89 Ind. App. 677, 680, 166 N.E. 676, 679 (prosecutor's remarks regarding

defendant's prior convictions was not prejudicial in a bench trial).

Furthermore, even if the trial court improperly considered Officer Earles' testimony, it was harmless error. At Helton's trial, two IGD members testified to the same evidence to which Officer Earles' later testified.[19] Officer Earles. testimony was thus merely cumulative and could

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[19] Biff Kinnick testified that (1) he was initiated into IGD in 1991, (2) Helton, Moran, and an IGD leader from Chicago called the February 12, 1992 meeting to initiate Hammons, (2) Helton hit Hammons in the head fifteen times, (3) Helton stated that since they were having trouble with others at school and other places that IGD members should walk in pairs and help each other and never back down if someone caused trouble, and (4) there were twelve to fourteen members.

Scott Bullington testified that (1) he was initiated into IGD in 1991 by receiving "a 46," (2) Helton was second in command at the February 12, 1992 meeting and struck Hammons 20 times as part of the traditional "46" initiation ritual, and (3) Helton stated members should walk in pairs, stick together, never back out of any fight, and that they would be violated (beaten as punishment) for missing a meeting and eight-balled (circled and beaten by eight other members) if they wanted out of the gang.

not have been prejudicial. See Alva, at 171 (prejudicial error cannot be predicated upon evidence which is merely cumulative and not decisive of guilt).

III. Battery and Consent

Helton contends that if the Gang Statute is constitutional, it does not apply to his conduct. First, Helton argues that because the Hazing Statute prohibits intra-group violence that the Gang Statute may only prohibit out-of-group violence. Second, Helton argues that because he restricted his beatings to consenting individuals, he did not commit a battery and therefore did not engage in criminal gang activity.

The legislature can, and has, addressed intra-group criminal activity in more than one statutory provision. It has done so within the Criminal Gang Control Act [20] itself. I.C. 35-45-9-4 expressly prohibits a person from threatening harm to another person for withdrawing from a criminal gang or for refusing to join a criminal gang. Furthermore, although gang members may consent to violence, intra-gang and gang-on-gang criminal activity have a direct, adverse impact on peaceful

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[20] I.C. 35-45-9-1, -4.

citizens and often result in a breach of the public peace. Therefore, we conclude that our legislature did not exempt all intra-gang activity from the Gang Statute, even where gang members consent to being abused.[21]

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[21] When applying a statute, our objective is to effectuate the legislatures purpose. Spaulding, 550 N.E.2d 307, 309. The court must make an independent determination as to the purpose of the statute. Indiana Aeronautics Comm. v. Ambassadair, Inc. (1977), 267 Ind. 137, 368 N.E.2d 1340, cert. denied, Four Winds, Inc. v. Indiana Aeronautics Commission, 436 U.S. 905 (1978). Although there is no preamble to Indiana's Criminal Gang Control Act, preambles of gang control statute of other states provide insight into the reasons such statutes were enacted. The preambles to the "Street Terrorism Enforcement and Prevention Act[s} of Louisiana and California state that the Acts were enacted in response to a state of crisis caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against and affecting peaceful citizens of their neighborhoods and in an effort to protect every person's right to be secure and protected from the activities of violent groups and individuals whether the activities directly or indirectly target the public. See Cal. § 186.20-21; La. 15:1401-1402. We believe the same driving forces compelled our legislature to enact Indiana 's Criminal Gang Control Act.

The Gang Statute was not intended to interfere with the constitutional exercise of the protected rights of freedom of association and expression. The criminal activities proscribed, individually and collectively, present a clear and present danger to the public

Helton's second argument that an intra-gang beating is not a battery relies upon the general rule that consent is a defense to the offense of battery.[22] However, our supreme court recently recognized exceptions to the general rule. Jaske v. State (1989), Ind., 539 N.E.2d 14, 18. Consent is not a defense to the charge of battery in these limited circumstances:

(1) Where the defendant goes beyond acts consented to and beats to death the victim who consented only to the

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order and safety and are not constitutionally protected.

[22] The general rule is that consent is ordinarily a defense to the charge of battery in cases (1) involving sexual overtones, (2) involving reasonably foreseeable and known hazards of lawful athletic contests or competitions, lawful sports or professions, or occupations, (3) where consent establishes justification for the serious harm, (4) involving reasonable corporal punishment by a teacher upon a pupil for disobedience and where reasonably necessary for the proper education and discipline of the pupil, and (5) where the battery is not atrocious, aggravated, or fatal and does not include a breach of the public peace. See Paul H. Robinson, 1 Criminal Law Defenses § 66, § 106 (1984); 58 A.L.R.3d 662.

Consent is connected with the harm or evil sought to be prevented; therefore, if the victim consents to defendant 's touching, that touching is not rude or insolent and should not be considered unlawful unless it meets one of the exceptions to the general rule.

defendant's execution of the organization's initiation ritual of being struck in the stomach until he passed out;
(2) Where it is against public policy to permit the conduct or resulting harm even though it is consented to, as where there are no sexual overtones and the battery is a severe one which involves a breach of the public peace, as well as, an invasion of the victim's physical security;
(3) Where consent is ineffective as where it is obtained by fraud or from one lacking legal capacity to consent;
(4) Where a deadly weapon is employed;
(5) Where death results; or,
(6) Where the battery is atrocious or aggravated. See Jaske, at 17-18 and citations therein.

Although the Jaske court made the broad statement that "consent is not a defense to the charge of battery," our supreme court did not hold that consent could never be a defense to the charge of battery. The rule in Jaske must be limited to its fact. and the facts of the supporting cases cited therein. The Jaske rule that consent is no defense to the offense of battery is the exception, rather than the general rule. If our supreme court had held that defense could never be a defense

to the charge of battery, it would have banned numerous legal activities, such as athletic contests, professions, and occupations involving invasions of one's physical integrity.[23]

Obviously, the Jaske court did not intend its holding to reach such conduct.

In the present case, Helton delivered 20 bare-fisted, hard blows directly to Hammond head as part of the IGD initiation ritual. Hammons, like other initiates, agreed to Helton's delivery of "a 46" after having been advised that it consisted of being struck 40 times in the head and 6 times in the chest. However, striking someone

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[23] A participant in an athletic event, game, or sport accepts the dangers inherent in the activity as far as they are obvious and necessary, but does not assume the risks associated with the negligence of others. 65(A) C.J.S. Assumption of Risk § 174(6) (1993). Consent is not a defense if the touching exceeds the scope of consent, violates an established rule, or if the victim was not made aware of the risks prior to consent. See id.; Paul H. Robinson, 1 Criminal Law Defenses S 106(b); Kabella v. Bouschelle, 672 P.2d 290 (N.M. App. 1983) (conduct prohibited by rules of football not assumed); Whipple v. Salvation Army, 495 P.2d 739 (Or. 1972) (conduct prohibited by rules not assumed).

continuously in an area which is susceptible of injury as severe as permanent brain damage is an atrocious, aggravated battery for which consent is no defense.[24] See Jaske, at 18 and discussion above. Helton's conduct is prohibited under the Gang Statute.

CONCLUSION

Indiana's Criminal Gang Activity Statute passes constitutional muster. Its prohibitions include a battery committed by one gang member on another consenting gang member. The trial court's erroneous admission of Officer Earles' testimony of IGD's history under the pedigree exception was harmless error.

Judgment affirmed.

ROBERTSON, J. and NAJAM, J. CONCUR

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[24] Although most IGD members are teenagers, the record does not include Hammons' age, so we do not address whether his consent to Helton's battery was also ineffective due to legal incapacity.

ORDER DENYING RE-HEARING

STATE OF INDIANA INDIANAPOLIS, IN

H. John Okeson
Clerk of Supreme Court
Court of Appeals and Tax Court

William Van Der Pol Jr.
38 N. Main St.
P.O. Box 1799
Martinsville, In 46151

55A01-9305-CR-00178
Lower Court Number:
55D019204CF73

HELTON, JAMES, II V. STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 8\06\96 APPELLANT'S PETITION FOR RE-HEARING IS HEREBY DENIED WITHOUT OPINION.
ALL JUSTICES CONCUR.

WITNES my name and the seal of said Court, this 6th day of August, 1996.

H. John Okeson
Clerk Supreme Court, Court of Appeals and Tax Court

STATEMENT OF ISSUES

I. Whether Indiana's Criminal Gang Activity Statute (Gang Statute) is unconstitutional because:

A. It is void for vagueness under the First and Fourteenth Amendments to the U.S. Constitution and article 1, S 9 and S 31 of the Indiana Constitution.

B. It is unconstitutionally overbroad and impermissible infringed upon Helton's right of association guaranteed under the First and Fourteenth Amendments to the U.S. Constitution and article 1, S 9 and S 31 of the Indiana Constitution.

C. It deprived Helton of equal protection of the laws as guaranteed under the Fourteenth Amendment to the U.S. Constitution, and article 1, § 23 of the Indiana Constitution.

II. Whether the trial court erred in allowing a police officer to testify as to the history of the Imperial Gangster Disciples under the pedigree exception to the rule against hearsay.

III. Whether the Gang Statute applies to Helton's conduct.

Indiana Code § 35-45-9-1

As used in this chapter, "Criminal gang " means a group with at least five (5) members that specifically:

(1) Either:

(a) Promotes, sponsors, or assists in ;or

(b) Participates in ;or

(2) Requires as a condition of membership or continued membership;

the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery

Indiana Code § 35-45-9-3

A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a class D felony.

U. S. CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise hereof; or abridging the freedom of speech, or of the press, or the right of the peoples peaceably to assemble, and to petition the government for a redress of grievances.

U. S. CONSTITUTION, AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, § 9 OF THE INDIANA CONSTITUTION

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever s but for the abuse of that right, every parson shall be responsible.

ARTICLE 1, § 31 OF THE INDIANA CONSTITUTION

No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.